No. 12206.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

GEORGE T. GOGGIN, Receiver of the Estate of Salsbury Motors, Inc., Debtor,

Appellant,

vs.

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION,

Appellee.

APPELLANT'S REPLY BRIEF.

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To the Honorable Judges of the United States Court of Appeals for the Ninth Circuit:

Comes Now the appellant, George T. Goggin, as Receiver of Salsbury Motors, Inc., Debtor, and submits the following reply brief:

I.

The Bank's Position Is Inconsistent, the Proposition That There Is No Need to Study the Statutory History and Older Cases Which Shaped Section 3054 of the California Civil Code Is Untenable.

The Bank's brief is afflicted with a major inconsistency. On the one hand, the Bank argues that the facts of the instant case are squarely within the definition of a banker's lien as defined by California Civil Code, Section

3054, and, on the other hand, it argues that cases involving a pledge or other special agreement are not applicable to the facts of this case. (Appellee's Br. pp. 4, 16.) The appellant can have no quarrel with the Bank over the words contained in California Civil Code Section 3054, Nevertheless, if those words are to be deemed conclusive (without reference to a multitude of cases on the subject), then they must also be equally conclusive in the several situations pointed out in Appellant's Opening Brief which are merely brushed aside by the Bank as exceptions.

For example, the Bank attempts to dispose of *Brandao v. Barnett* (Appellee's Br. p. 14), with the statement that the securities were not deposited with the Bank in the usual course of business transactions. It is clear from the case that the securities were deposited with the Bank for safekeeping and that the Bank was even authorized to handle the securities for certain specified purposes. Surely, the safekeeping function of banks is as ancient and widespread as their collecting function. If we were to superimpose the bare language of California Civil Code Section 3054 upon the factual situation in the *Brandao* case, it could well be argued afresh that the Bank would be entitled to a lien upon items in safe deposit boxes.

The Bank contends that the lien should exist in the instant case because "every single element of the banker's lien provided for by the code section exists" herein (Appellee's Br. p. 5), but is unable to explain the case of *Berry v. Bank of Bakersfield, Della v. The Home Bank of Porterville,* or *Anglo Cal. Bank v. Grangers' Bank* (Ap-

pellee's Br, pp. 16, 17) where the same elements existed, save to state that these are exceptions.[1]

It can hardly be argued that such exceptions are contained in the words of the statute itself.

The reason the Bank is caught in this self-contradictory position may be explained, perhaps, by its equally untenable statement that the application of Section 3054 of the Civil Code must not be determined by authorities prior to its enactment. (Appellee's Br. p. 12.) It is, of course, not the understanding of appellant that only pre-1872 cases are admissible in the discussion of this question. Indeed, Appellant's Opening Brief presents cases dating before 1872 only in a few instances. But these early cases are of extreme importance because they are cited by the Code Commissioners in their notes to the Code. The banker's lien statute did not spring full blown from the minds either of the California Code Commissioners or of the legislators in 1872. Section 3054 was merely a restatement of the law merchant and the Code Commissioners presented it to the legislature as such; it was presumably enacted into law on that basis. (App.

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[1]See also cases cited App. Op. Br. p. 39, fn. 20.

Further, the Bank is in error when it contends that the basis for the corresponding bank cases is that "the *forwarding* bank held the item for collection merely and consequently *had no title.*" (Appellee's Br. p. 14.) The Supreme Court of the United States, in *Bank of Metropolis v. New England Bank* (1843), 1 How. (42 U. S. 234), expressly refused so to hold. The Court stated at length (1 How. at p. 239) that so long as the forwarding bank treated the negotiable paper as its own, the corresponding bank was under no obligation to inquire whether the forwarding bank was the agent or the owner; and the Court went on to state that the crucial question was not that of title but rather whether there had been an advance of money upon this paper.

No attempt was made in Appellee's Brief to meet the numerous cases cited by Appellant not involving corresponding bank cases.

Op. Br. p. 24.) Until now, appellant was of the settled belief that it was no longer necessary to argue the value and propriety of statutory history.

The Commissioners' Notes and the early cases forcefully demonstrate that the foregoing cases are not mere "exceptions" or merely "inapplicable." Rather, they were factual situations that never fell within the intended meaning, definition and extent of the banker's lien. All of those cases deal with usual and ordinary banking functions. All of them are within the words of the statute. But the banker's lien was never intended to, nor does it, apply where the bank holds merely as an agent or has never extended credit on the faith of the property in its custody. Unless viewed in this light and unless taken historically and analytically, these cases are irreconcilable with the language of California Civil Code Section 3054.

II.

The Bank's Own Authorities Require an Extension of Credit as a Condition to the Application of the Banker's Lien.

The Bank also contends that the overwhelming weight of authority supports its position that the banker's lien applies under the facts of the present case. The Bank's cases, on their face, do not so hold and its textual and encyclopedic references are too general to be of material aid. It is appellant's position that the general and meaningless reiterations, without analysis, displayed in Appellee's Brief are inadequate in the light of the cases and reasoning supporting appellant. Most of the cases cited by the Bank have been carefully analyzed in Appellant's Opening Brief and they are actually in support of appellant rather than in support of the Bank.

In fact, the quotation from American Jurisprudence lends support to appellant's position. The Bank submits one quotation on page 9 of its brief which is wholly undone by the quotation on page 15. But even the quotation on page 15 is inadequate. Appellant therefore takes the liberty of repeating in full the statement from American Jurisprudence contained on page 15 of appellee's brief and, in addition language, immediately following:

> "The reason given for allowing the lien is that any credit which a bank gives by discounting notes or allowing an overdraft to be made is given on the faith that money or securities sufficient to pay the debt will come into the possession of the bank in the due course of future transactions. [End of quotation in Appellee's Br., p. 15.] Such a lien, however, is not recognized in any case where there exist circumstances or a course of dealing inconsistent with its existence, and it would seem that the lien should be confined to securities and valuables which may be in the banker's custody as collaterals. The credit must be given on the credit of securities or valuables either in possession or expectancy. This is properly the extent of the banker's lien . . ."

The Bank has also placed stress upon the case of *In re Gesas* (C. C. A. 9, 1906), 146 Fed. 734, which contained an interpretation of an Idaho statute identical to Section 3054 of the California Civil Code. The Bank neglected to quote from a portion of the case immediately preceding the language set forth on page 9 of its brief. The language is as follows:

> "This [Idaho] statute seems chiefly to be but a statement in statutory form of the law upon this subject, as generally recognized: That bankers have

liens upon any security or property coming into their possession in the usual course of banking business, for the payment of any indebtedness due them from the owner or depositor of such securities. This rule is subject to modifications, which may be illustrated by quotations from *Reynes v. Dumont,* 130 U. S. 354, 9 Sup. Ct. 486, 32 L. Ed. 934. Quoting from other authorities, it is said (page 390 of 130 U. S., page 495 of 9 Sup. Ct. [32 L. Ed. 934]): 'A general lien does arise in favor of a bank or banker out of contract, expressed or implied, from the usage of the business, in the absence of anything to show a contrary intention. It does not arise upon securities accidentally in the possession of the bank, or not in its possession in the course of its business as such, nor where the securities are in its hands under circumstances, or where there is a particular mode of dealing, inconsistent with such general lien . . . *'A banker's lien . . . ordinarily attaches in favor of the bank upon the securities and moneys of the customer deposited in the usual course of business, for advances which are supposed to be made upon their credit . . . Here, then, . . . is the true principle upon which this, as well as all other banker's liens, must be sustained, if at all. There must be a credit given upon the credit of the securities, either in possession or in expectancy.'*"

"From the foregoing, two principles may be deduced: The securities upon which liens may be maintained must be deposited in the regular course of the banking business, in which also is implied, I think, that they must be of the character or class usually dealt in or deposited in banks in the course of their usual banking business, *and the debt must have been incurred upon the faith of such securities actually delivered or promised.*" (Italics added.)

(At this point, begins the quotation found on page 9 of Appellee's Brief.)

The *Gesas* case itself dealt with a situation in which property was placed in the possession of the bank for the very purpose of securing a debt to that bank. The court never resolved the question it raised as to whether the rule stated in *Reynes v. Dumont* applied to the Idaho statute, but concluded that stock in trade given to a bank for the purpose of securing a debt did not fall within the "usual course of the business" and that therefore the banker's lien would not apply in any event. In California, we have no problem as to whether the common law (more accurately, law merchant) rules, stated in *Reynes v. Dumont* and elsewhere, are applicable to the statutory definition of the banker's lien, since the California cases and the Commissioners' Notes have settled this question, if it ever actually existed, in emphatic language. (App. Op. Br. p. 24, and fn. thereon.)

III.

The Bank Cannot Establish a Power Coupled With an Interest in This Case. The Agency for Collection Was Terminable at the Will of the Principal.

In addition to its inconsistent arguments upon the "plain-wording" of the statute as against the well-settled exceptions not contained in that wording, and its refusal to face the legislative and statutory and case law history of California Civil Code Section 3054, the Bank has further seriously erred in contending that the agency for collection in the instant case was "coupled with interest." (Appellee's Br. pp. 19-20.) The Bank has been presented with well-settled authority to the effect that when notes are placed in the custody of a bank for collection, and the

bank does not advance credit on the notes, the bank takes the notes only as an agent with the owner of those notes as its principal. (App. Op. Br. p. 17.) The cases are in such unanimity of agreement to this effect, that we do not understand that the Bank would undertake to deny them. Certainly, no such attempt was made in the section of its brief on this subject.[2] (Appellee's Br. pp. 19-20.)

The Bank has, however, sought to interject into this well-settled proposition the concept of an agency coupled with an interest. An agency coupled with an interest constitutes an irrevocable power. The Bank could assert an irrevocable power or agency only if the notes were taken as security or if elements of an estoppel were present. But the Bank has cited no case to show that a collecting agent is entitled to retain the notes and drafts of its principal in violation of the terms of the agency merely because on another occasion the agent lent money to the principal under terms of repayment that made no mention of the lender's collecting function. In the instant case,

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[2]The Bank cited two cases but they are inapplicable:

The case of *First Nat. Bank of Corona v. Coplen* (1919), 39 Cal. App. 619, is no authority for the Bank's position. (Appellee's Br., p. 19.) That case refers to the banker's lien in language but is actually concerned with the right of set-off. The Bank merely sought to set-off a deposit against a debt of the depositor owing to the bank. The Bank also cites the *Kane* case as authority for this remarkable proposition of law, but it is notable that in the *Kane* case, credit was extended by the bank on the deposit of the checks; the checks were actually deposited in the account of the customer, and said checks were actually collected by the bank and the receipts of said collections seized by the bank *before the commencement* of the bankruptcy proceedings. There is nothing in either of these cases holding that a note in the custody of a bank for collection only, and upon which no credit was extended, cannot be withdrawn by the customer at will.

For a full discussion of the *Kane* case, see footnote 4, page 34, Appellant's Opening Brief.

the debtor made no agreement, and had no obligation, to employ the Appellee-Bank to collect the notes or drafts involved. The debtor could at any time have assumed direct collection, employed another agency or even another bank. If the Bank's theory is to hold water, then every businessman, after borrowing from his bank, should use a different bank to collect his notes and drafts. This requirement would be ridiculous and, therefore, highlights the error of the lower court.

The doctrine of agency coupled with an interest was presumably put forward by the Bank in order to counter the authorities presented by the appellant to the effect that the date of the filing of the petition for arrangement was the date of cleavage. At that time the rights and the duties of the parties were frozen and the relationship of the parties must be considered as of that date. (App. Op. Br. pp. 17 and 18, footnote 4.) We must assume, therefore, that the Bank is arguing that a principal is never entitled to revoke his agent's authority to collect notes or drafts until the agent has been paid any other debts owing to it by its principal. This argument is made by the Bank despite the fact that in the instant case, the principal borrowed money from the agent in an entirely separate transaction pursuant to a well-defined agreement, which agreement provided for certain security and made no provision for the notes and drafts presented to the Bank for collection to constitute additional collateral.

It is established law that the authority of the agent may be revoked at the will of the principal, although it is possible that some liability might arise for such collection expenses as might have been incurred up to that time by the Bank. The very problem of the revocability

of the authority to act as a collecting agent was passed upon by the New York Court of Appeals in *Potter v. Merchants' Bank* (1864), 28 N. Y. 641. That case is of particular pertinence to this proceeding because it dealt not only with the power of the principal to revoke the authority of the agent, but involved a question of banker's lien, as well. In the *Potter* case, the plaintiff was the receiver of an insolvent bank. The cashier of the bank, before insolvency, sent an item to the defendant bank for collection. Usually, according to the evidence, such items were credited on the account of the insolvent bank on the defendant's books, but that was not done in this case. Subsequent to the insolvency, but before the collection of the due date of the note, the plaintiff receiver demanded the return of the note. The defendant bank refused, claiming that it held the note under its right of lien for its balance of account. The New York Court of Appeals held that the defendant bank had custody of the note only as agent for collection. The title, therefore, was in the plaintiff. The opinion of the court contains the following statement (28 N. Y. at page 652):

> "The defendant, after it acquired possession of the note, held it as the agent of the Bank of Medina for the purposes of collection, and as the demand was made before maturity of the note, there is no ground for claiming that a title to it passed to the defendant. The demand terminated the agency, and the refusal was evidence of a conversion."[3]

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[3]For a case so holding where the revocation of authority was by an individual and not by a bank, see *First Nat. Bank v. Morrell and Co.* (1928), 53 S. D. 496, 221 N. W. 95.

There is no contention by the Bank in the instant case that any title to the notes and drafts ever passed to it. The title to the notes and drafts concededly remained in the debtor and, consequently, in the appellant. Accordingly, the agency was revocable at any time in accordance with the ruling in the *Potter* case and with the rules of agency generally.[4]

It is important to note that in the *Potter* case the defendant bank contended that it retained the note under its right of banker's lien for the balance of account due it. The Court specifically held that the doctrine of banker's lien had no application because the agency of the bank was terminated before collection.

Accordingly, at the time of the filing of the petition for arrangement herein, the parties occupied a principal-agent relationship and the rights and liabilities were frozen as of that date. The ownership of the notes passed to the receiver who was entitled to, and did, revoke the authority of the Bank to collect the notes and drafts.

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[4]*McGorray v. Stockton Sav., etc., Soc.* (1901), 131 Cal. 321. In this case, the plaintiff had deposited a sum of money with the defendant bank to be paid to the sheriff upon the latter's delivery of a certain certificate to the defendant bank. Subsequently the plaintiff revoked the agency but the bank refused to return the money to plaintiff. In reversing a judgment for defendant, the Supreme Court of California stated (131 Cal. at p. 325):

> ". . . the bank became the agent of plaintiff to do a particular act (Civ. Code, secs. 2295, 2297); and the principal (plaintiff) could terminate the agency at any time before the act was performed and before any rights of third persons had intervened; the agency was terminated by its revocation. (Civ. Code, sec. 2356.)

IV.

The Doctrine of Set-off Is Inapplicable to the Facts of This Case.

It is not the purpose of appellant to embark here on a further discussion of the applicability of the rules of set-off to the facts of the instant case. The arguments and cases cited on pages 15 through 18 and in footnote 5 extending from page 18 to page 20 of Appellant's Opening Brief are sufficient to demonstrate that the doctrine of set-off is inapplicable here.

Appellant wishes to take specific exception, however, to the statement by the Bank (Appellee's Br., p. 24) that the facts in the instant case are "practically identical" with those in the *Half Moon Produce* case. The produce company, in that case, extended credit upon the melons and the melons were sold before the petition in bankruptcy of the grower had been filed. (Appellant's Op. Br., footnote 5, pp. 19-20.) The facts in the *Half Moon* case are therefore widely at variance with those of the instant case.[4a]

[4a]The Bank compares the instant case to one arising under Section 57(h) of the Bankruptcy Act where it is required that secured creditors shall convert into money the securities held by them, pursuant to the agreement by which such securities were delivered to the creditors. The notes and drafts in the instant case were not delivered to the Bank as security under any agreement. A loan had been made earlier, and the Bank took a trust deed as security for that loan. Nothing was stated in the loan agreement between the debtor and the Bank concerning collection items. Therefore, there can be no analogy between the applicability of the doctrine of set-off to the instant facts and cases arising under Section 57(h) of the Bankruptcy Act.

V.

The Bankruptcy Court Had Summary Jurisdiction.

The Bank has raised the point of absence of summary jurisdiction by the Referee in the instant case (Appellee's Br., pp. 27-28), but has cited no case authority to sustain its position, merely contending that it did not consent to the jurisdiction of the bankruptcy court.

The record shows that the Bank voluntarily filed a proof of claim in the within bankruptcy proceedings. [Tr. 13.] It therefore sought to share in the bankrupt estate and consequently the Receiver was entitled to object to said claim and to seek affirmative relief.[5]

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[5]*In re Mercury Engineering Co.* (1945), D. C. S. D. Cal. (60 Fed. Supp. 786, at pages 787-788):

> "My own impression is, despite some older decisions by other judges of this district, that in the light of the more modern trend to identify the function of the Referee in passing on claims with that of a court of equity (see Pepper v. Litton, 308 U. S. 295, 308, 60 S. Ct. 238, 84 L. Ed. 281), the right to award a judgment for the surplus exists. The right to enter judgments is specifically conferred by Subdivision 15 of Section 2, sub. a, of the Bankruptcy Act of 1938, 11 U. S. C. A. §11, sub. a(15). The power to allow and disallow claims is conferred by Subdivision a of Section 2, 11 U. S. C. A. §11, sub. a. Section 68, subs. a and b of the Act, 11 U. S. C. A. §108, subs. a and b, grants the power of determining set-offs and counterclaims. Courts which have interpreted these new enactments are of the view that they aim to make the Referee 'an officer authorized to perform judicial duties.' Donald v. Bankers Life Co., 1939, 5 Cir., 107 F. 2d 810, 812. Counterclaims, set-offs and cross bills are creatures of equity carried over into modern pleading. One who comes into a court of equity and asks that it give recognition to a claim, so that he may share in an estate before it in the proportion which his claim bears to the value of the estate, has brought before the court the determination of his entire claim. And if the court finds that his claim is invalid, he is not in a position to say that the court, the jurisdiction of which he invoked, has no power to render judgment against him for the surplus. See:

A problem similar to the one presented herein was discussed by the Court in *In re Michaelis and Lindeman* (U. S. D. C. N. Y., 1912), 196 Fed. 718. There a receiver sought to bring a turnover order against the Bank in order to recover moneys that the bankrupt had unknowingly deposited with the Bank after an involuntary petition in bankruptcy had been filed against him. The bank contended that the Court had no summary jurisdiction. In reply to this contention, the Court stated in its opinion (196 Fed. at p. 719):

". . . This motion requires a somewhat novel application of what I think are elementary principles. It may be assumed, as stated in *In re Zotti* (C. C. A.

Alexander v. Hillman, 1935, 296 U. S. 222, 238, 56 S. Ct. 204, 80 L. Ed. 192; Florance v. Kresge, 4 Cir., 1938, 93 F. 2d 784.

"As said in Alexander v. Hillman, *supra,* 296 U. S. at page 237, 56 S. Ct. at page 209, 80 L. Ed. 192:

" 'The receivers are the court's representatives and are entitled to have all the property belonging to defendant, and, upon leave, may sue to recover any part of the *res.* The controversies before us arise between respondents who come to share therein and the receivers who not only put in issue the validity of respondents' claims but allege that they have and refuse to account for a portion of the assets. Undoubtedly the court has jurisdiction of the subject-matter, *i. e., the claims and counterclaims.*' [Emphasis added.]

"And, while the court there was dealing with receivers, the principle is the same in bankruptcy. See: Floro Realty Investment Co. v. Steem Electric Corporation, 1942, 8 Cir., 128 F. 2d 338, 340, 341. The trustee is the representative of the court, entitled to the property belonging to the bankrupt. Bankruptcy Act, 1938, §70, 11 U. S. C. A. §110; Sampsell v. Imperial Paper Corporation, 1941, 313 U. S. 215, 217, 218, 61 S. Ct. 904, 85 L. Ed. 1293. It is made his duty to reduce the property to his possession. Bankruptcy Act of 1938, Sec. 2, sub. a(7), 11 U. S. C. A. §11, sub. a(7). And when a claim is presented for a share of this property, the bankruptcy court has jurisdiction to determine its validity, which includes not only objections aiming to defeat it but also to recover, for the estate, any surplus owing the bankrupt.1" [Court's footnote 1 omitted.]

2d Cir.), 26 Am. Bankr. Rep. 234, 186 Fed. 84, 108 C. C. A. 196, that the receiver in bankruptcy is but a custodian without title for the purpose of preservation and not for the purpose of distribution of the estate. Nevertheless he is entitled to take custody of whatever is plainly the property of the bankrupt and against which no third party makes any claim with color of title.

"It may also be admitted that there is no power in the court by summary order to divest a third party of any title (even a fraudulent one) asserted by him against the bankrupt or his trustee. But this does not prevent the entry of a summary order where the only title set up rests, not upon any matter of fact, but upon a statement of law.

". . . In my opinion, therefore, the mutual account between these bankrupts and their bank of deposit was closed by operation of law the moment petition was filed, and any money thereafter entrusted by the bankrupts to the bank was like a deposit with another person and not subject to any set-off existing before petition."

The principle of the *Michaelis* case was subsequently approved by the United States Supreme Court in *May v. Henderson* (1924), 268 U. S. 111. There, an assignee for the benefit of creditors, also occupied the position of president of a bank to which the bankrupt was indebted; further, the bankrupt had a deposit account at that bank. Both before and after the filing of the petition in bankruptcy, the assignee-bank president caused the bankrupt's account to be applied to the bankrupt's note to the bank. In a summary proceeding brought to compel the assignee-bank president to pay to the trustee in bankruptcy an amount equal to the deposit of the bankrupt, both before

and after the filing of the petition in bankruptcy, the assignee objected to the summary jurisdiction of the bankruptcy court. The Supreme Court of the United States affirmed the summary jurisdiction of the bankruptcy court in emphatic terms, stating that the claim in that case was merely colorable.[6]

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[6]*May v. Henderson,* 268 U. S. at pages 115-117:

". . . Courts of Bankruptcy do not permit themselves to be ousted of jurisdiction by the mere assertion of an adverse claim. The court has jurisdiction to inquire into the claim for the purpose of ascertaining whether the summary remedy is an appropriate one within the principles of decision here stated. *Mueller v. Nugent, supra; Schweer v. Brown* (C. C. A. 8th Cir.), 130 F. 328, 64 C. C. A. 574; *Id.,* 195 U. S. 171, 25 S. Ct. 15, 49 L. Ed. 144; *Hebert v. Crawford,* 228 U. S. 204, 30 Am. B. R. 24, 33 S. Ct. 484, 57 L. Ed. 800; *In re Ellis Bros. Printing Co.* (D. C., N. Y.), 19 Am. B. R. 472, 156 F. 430. It may disregard the assertion that the claim is adverse, if on the undisputed facts it appears to be merely colorable. *In re Weinger, Bergman & Co.* (D. C., N. Y.), 11 Am. B. R. 424, 126 F. 875; *In re Rudnick & Co.* (D. C.), 158 F. 223; *In re Ransford* (C. C. A., 6th Cir.), 28 Am. B. R. 78, 194 F. 658, 115 C. C. A. 560; *In re Michaelis & Lindeman* (D. C., N. Y.), 27 Am. B. R. 299, 196 F. 718.) . . . The rule is the same when a creditor secures payment of his debt from the bankrupt's estate after the filing of the petition. A summary order may be made directing repayment of the money to the trustee in bankruptcy. *Knapp & Spencer Co. v. Drew; In re Leigh; Matter of R. & W. Skirt Co., supra; In re Columbia Shoe Co.* (C. C. A. 2d Cir.), 1 Am. B. R. (N. S.) 233, 289 F. 465. A like rule has been applied where a bank secures payment of its debt by setting up its lien or right of counterclaim against a deposit account of the bankrupt or the bankrupt's assignee, created subsequent to the filing of the petition. *Michaelis v. Lindeman,* 196 Fed. 718; *Reed v. Barnett Nat. Bank, supra.* See *Farmer's & Mechanics' Bank v. Wilkinson,* Trustee, 266 U. S. 503. Any other rule would leave the Bankruptcy Court powerless to deal in an effective way with those holding property for the bankrupt who, pending the bankruptcy proceedings, wilfully dispose of it by placing it beyond the reach of the court. *Bryan v. Bernheimer,* 181 U. S. 188 61."

See also the cases of *In re Cuyahoga Finance Co.* (C. C. A. 6th 1943), 136 F. 2d 18; *In re Mauch Chunk Brewing Co.* (C. C. A. 3d 1942), 131 F. 2d 48; *Twentieth Street Bank v. Gilmore* (C. C. A. 4th, 1934), 71 F. 2d 594 at page 597; *In re American Coils Co.* (D. C., N. J. 1947), 74 Fed. Supp. 723.

Accordingly, the bankruptcy court has summary jurisdiction to order the Bank to pay over an amount equal to the sum of the notes and drafts herein; upon the theory that the Bank's withholding of said amount is based merely upon an untenable argument of law[7] and that the Bank has merely colorable title (which was the first holding of the Referee below), and upon the theory that the Bank voluntarily submitted itself to the jurisdiction of the bankruptcy court by filing its proof of claim in the within proceedings.[8] The latter theory is supported not only by the *Mercury Engineering* case (discussed at length in footnote No. 5 above) but by *Chase National Bank v. City of New York v. Lyford* (C. C. A. 2d 1945), 147 F. 2d 273. The *Lyford* case involved a railroad reorganization where the bank had set off deposits of the debtor on the day of the filing of a petition under Section 77 of the Bankruptcy Act. The bank later filed a proof of claim showing this offset and requesting the balance owing to it. The Court found that the claim of the bank should be allowed in its original amount and ordered a return to the trustee of moneys equal to the deposits which had been set off by the bank. The Court cited *Alexander v. Hillman, 296* U. S. 222, to the effect that in an equity receivership the presentation of a claim subjected the claimants to all the consequences that attach to an appearance. The Court went on to state in its opinion in the *Lyford* case, however, that it was not necessary to rely upon the *Alexander* case because the Bank had disclosed in its own claim

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[7]See, also, *Bank of California National Ass'n v. McBride,* C. C. A. 9 (1943), 132 F. 2d 769.

[8]See, also, *Gardner v. New Jersey* (1947), 329 U. S. 565.

the fact of the setoff and thus presented the question of its validity to the Court. The opinion of the Court (147 F. 2d at p. 277) states:

> "Moreover, here the very claim of the bank, since it disclosed the application of the balance and was for the net amount remaining after such application, presented to the Court the issue of validity of bank's conduct in applying the balance."

Precisely this situation was presented to the bankruptcy court in the instant case. The Bank presented its proof of partially secured debt [Tr. 13] and in that proof of debt, the Bank expressly stated that it held "said notes, drafts and bills of lading under its right of offset, counterclaims and banker's lien." [Tr. 15.] The Bank, therefore, came into a court of equity and requested payment on its claim by showing in that very claim that it had withheld, under some purported and untenable claim of legal right, property belonging to the debtor.

The Bank submitted its entire course of dealings with the debtor to the approval of the Court and invoked the jurisdiction of the Court to approve those dealings and to order the payment of moneys to the Bank. Under the authorities hereinabove cited, it is now well-settled law that the bankruptcy court had summary jurisdiction to order the Bank to return the notes and drafts, or the amount thereof, to the receiver for the debtor. As against the unequivocable holdings of these authorities, the Bank has cited no cases.

Conclusion.

In its Brief, the Bank has taken mutually inconsistent positions. On the one hand, it argues that the language of the California Statute is clear and unequivocable and that, therefore, any state of facts which might technically fit within the language of that statute is, will entitle the Bank to the fruits of the lien. On the other hand, the Bank cannot ignore the many cases cited by the appellant (some of those cases having been referred to in the very notes of the Commissioners who drafted and recommended the adoption of Code of Civil Procedure Section 3054), to the effect that the lien does not apply in a variety of situations where no credit was extended upon the faith of the items although held in the custody of the Bank. The Bank concludes that in such cases (as for example, where property is pledged for a specific debt, or is in a safe deposit box, or is in the hands of the Bank as an escrow holder, etc.) the strict wording of the statute does not apply. These are described as "exceptions." It is the contention of the appellant that these so-called exceptions are explained by the language and theory of the leading cases on the subject. There must be an extension of credit in reliance upon the notes and drafts, or other property, and without such extension of credit, the banker's lien does not apply. Where no credit is extended and the Bank takes the paper for collection only, it is a mere agent; it has no interest in the paper, can assert no lien thereon, and is subject at all times to the directions of its principal.

The Bank never had true possession of the notes and drafts. Where credit is extended on the faith of notes

and drafts placed with a bank for collection, the bank is in a position to contend that it has possession of those notes and drafts in the sense that the concept of possession is understood in the law. But, as has been pointed out in Appellant's Opening Brief and herein, where the Bank is merely an agent for collection, it has only bare custody subject to the direction of its customer; the agency of the bank to collect the notes and drafts is terminable at the will of the principal.

It is submitted that the orders of the Court below should be reversed; that the objections of the receiver to the claims of the Bank of America be sustained; and that the Bank be ordered to forthwith pay to the estate the sum of $178,950.93.

Respectfully submitted,

GENDEL & CHICHESTER and
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By MARTIN GENDEL,

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